COTRA ENTERPRISES SDN BHD

v.

PAKATAN MAWAR (M) SDN BHD

HIGH COURT MALAYA, MELAKA
AHMAD MAAROP JC
[CIVIL SUIT NO: 22-315 OF 1999]
13 JUNE 2001

CIVIL PROCEDURE: *Summary judgment - Appeal - Claim for rescission of agreements - Whether should be made under O. 81 of the Rules of the High Court 1980 - Applicability of O. 14 r. 1 RHC*

The deputy registrar had earlier dismissed the appellant's application for summary judgment on the basis that, since the appellant's claim was for rescission of five written agreements, the appellant should have applied under O. 81 of the Rules of the High Court 1980 ("RHC") and not O. 14. r. 1 of the RHC. The appellant appealed to the judge in chambers.

Held:

[1] If the appellant's claim is allowed, it would tantamount to making an order declaring the five agreements void or rescinded and therefore; at an end. Hence, this claim is in the category of a claim for rescission coupled with a claim for damages, bringing it under O. 81 r. 1 of RHC. Order 14 r. 1 RHC shall not apply and thus, the appellant's earlier application for summary judgment cannot stand. The deputy registrar's decision to reject the said application was correct.

[Appellant's appeal dismissed with costs.]

Case(s) referred to:
Johnson v. Agnew [1980] AC 367 ***(foll)***
Manggai v. Government Of Sarawak & Anor [1990] 2 MLJ 41 ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (Executor Of The Estate Of Loo Cheng Chee) [1998] 4 CLJ 812 ***(refd)***
Song Toh Chu v. Chan Kiat Neo [1973] 2 MLJ 206 ***(dist)***
Teh Khem On v. Yeoh & Wu Development Sdn Bhd [1996] 2 CLJ 1105 ***(foll)***
Xavier Kang Yoon Mook v. Insun Development Sdn Bhd [1995] 2 CLJ 471 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14 rr. 1(a), (b), (c), (3), O. 81 r. 1

Rules of the Supreme Court 1965 [UK], O. 14 r. 1, O. 86 r. 1

Other source(s) referred to:
Anson, *Law of Contract*, 26th edn, p 223-224
GH Treitel, *The Law Of Contract*, 3rd edn, p 312
The Malaysian High Court Practice 1998, Desk edn p 5301
The Supreme Court Practice 1997, vol 1, part 1, p 1437
Visu Sinnadurai, *The Sale And Purchase Of Real Property In Malaysia*, (1984) p 337

For the plaintiff - SG Gan; M/s Yong Dan Rakan-rakan
For the defendant - J Amardas; M/s KP Ng Amardas

Reported by Raja Vishnu Sivarajah

JUDGMENT

Ahmad Maarop JC:
In the summons in chambers (encl. 7) the appellant applied for a summary judgment under O. 14 r. 1 of the Rules of the High Court 1980 (RHC). The appellant prayed for the following orders:

(a) suatu deklarasi bahawa kelima-lima Perjanjian-Perjanjian Jual Beli bertarikh 22.10.95 masing-masing telah batal;

(b) jumlah sebanyak RM2,085,390.00;

(c) faedah kadar 8% p.a. ke atas RM2,085,390.00 dari 22.10.1995 sehingga tarikh penghakiman menurut seksyen 11 Akta Undang-Undang Sivil 1956;

(d) faedah pada kadar 8% p.a. ke atas RM2,085,390.00 dari tarikh penghakiman sehingga tarikh penyelesaian penuh;

(e) gantirugi khas sebanyak RM13,522.00;

(f) gantirugi am untuk ditaksir oleh Mahkamah;

(g) gantirugi contoh ("exemplary damages") untuk ditaksir oleh mahkamah;

(h) faedah pada kadar 8% p.a. ke atas jumlah di (e), (f) dan (g) dan tarikh penghakiman sehingga tarikh penyelesaian penuh;

(i) kos;

(j) kos atas dasar peguam-peguam dan

(k) perintah selain dan selanjutnya yang difikirkan patut dan suaimanfaat oleh Mahkamah yang mulia ini.

On 13 October 2000 the deputy registrar dismissed the appellant's application. The deputy registrar ruled that since the appellant's claim was for rescission of the five written agreements, the appellant should have applied under O. 81 of RHC and not under O. 14 r. 1 of RHC.

The appellant being dissatisfied with the deputy registar's decision, appealed to the judge-in-chambers.

Order 14 r. 1(3) RHC provides:

> This order **shall not** apply to an action to which O. 81 applies.

Order 81 of RHC provides:

> (1) In any action begun by writ indorsed with a claim:
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> (b) for rescission of such an agreement;
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> the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

Order 81 therefore provides for a procedure similar to the procedure under Order 14, enabling a plaintiff to obtain a summary judgment in an action for the reliefs specified in r. 1 (a), (b) and (c). However, there are a number of procedural differences between the two orders. *The Malaysian High Court Practice 1998*, Desk edn p. 5301 sets out the major differences as follows:

(a) the plaintiff can apply for summary judgment under O. 81 without awaiting entry of appearance by the defendant (see r. 1(2) and before service of statement of claim. Under O. 14, the statement of claim should have been served on the defendant and the defendant must have entered appearance before the plaintiff can apply for summary judgment (see O. 14 r. 1(1));

(b) the summons under O. 81 must be set out or have attached thereto minutes of judgment sought (see r. 2(2);

(c) an application under O. 81 should relate to the whole action whilst an application under O. 14 may relate to a particular part of the claim (see O. 14 r 1(1));

(d) in O. 14 proceedings, the affidavit supporting the application may be affirmed by the plaintiff or the solicitor for the plaintiff or the plaintiff's or solicitor's clerk or persons duly authorised by the plaintiff (see form 18 and *Malayan Banking Bhd v. Chua Keng Seng* [1991] 3 CLJ 2522). Although there is no particular form specified for an affidavit in support of an application under O. 81, a stricter requirement is imposed with respect to the deponent; it should be made by some person who can swear positively to verifying the cause of action (r. 2(1));

(e) there is no corresponding provision to O. 14 r. 5 and therefore a defendant cannot utilise the O. 81 procedure for summary judgment of a counterclaim in action under O. 81 which specifies that this order applies only to actions begun by writ. It is suggested that the O. 14 procedure would be available since O. 81 is not applicable to a defendant in an action by way of counterclaim with respect to claims in the nature that is specified in O. 81 r. 1(1)(a), (b) and (c).

The provision under O. 14 r. 1(3) RHC makes it clear that an application for summary judgment could not be made under O. 14 RHC, in an action to which O. 81 applies. This would mean that an application (made under O. 14 r. 1) for summary judgment in an action to which O. 81 applies cannot stand and ought to be dismissed. To rule otherwise and to say that O. 14 r. 1 could still be resorted to in an action to which O. 81 applies would, to my mind be rendering the provision under O. 81 nugatory.

It is therefore important for the court to determine the preliminary issue whether the action commenced by the appellant against the respondent in this case is an action to which O. 81 applies. The answer to this would depend on the question whether the action in this case is an action begun by writ indorsed with a claim for rescission of an agreement.

There is no doubt that in this case the writ filed by the appellant is indorsed with a claim for a declaration that the five written agreements in this case are void (telah batal). This claim is repeated in para. 14(a) of the statement of claim. The question is, does this endorsment make the action in this case an action "indorsed with a claim for rescission" of an agreement?.

Learned counsel for the appellant contended that the action taken by the appellant was not an action to which O. 81 applies. According to her the appellant was not applying for rescission, because the five agreements had already been rescinded by the appellants. The appellant, she contended was asking for a declaration to confirm its decision to rescind the five written agreements. She admitted that she had not, in the course of preparing this case, been able to find a case directly on point. However, she submitted that this type of application had been allowed by the court. In support she cited the case of *Xavier Kang Yoon Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471 and *Song Toh Chu v. Chan Kiat Neo* [1973] 2 MLJ 206.

In his reply, learned counsel for the respondent contended in substance that the action taken by the appellant was an action for rescission of agreements. According to him if the agreements had been rescinded what was the necessity of coming to court to ask for a declaration. He submitted that all the appellant needed to do was to come to court to ask for damages. No case law was cited in support of this contention. It was also the respondent's contention that since

declaratory relief is a discretionary remedy, it must be guided by certain settled principles. In this connection he contended that the court would not grant a rescission if there was an alternative remedy. The case of *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (Executor Of The Estate Of Loo Cheng Chee)* [1998] 4 CLJ 812 and *Manggai v. Government Of Sarawak And Anor* [1990] 2 MLJ 41 were cited in support.

I do not think that *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* and *Song Toh Chu v. Chan Kiat Neo* are cases on point and would help much in resolving the issue. Both cases are not on the application of O. 14 or O. 81 RHC and the issue raised in the case before me was not canvassed in both cases.

The declaration applied for by the appellant in the writ is a declaration that the five agreements are void. Learned counsel for the appellant submitted that the appellant had given notice to the respondent rescinding the five agreements. Therefore she contended that there was no requirement for the appellant to apply specifically to the court to rescind the five agreements. In support she quoted *The Law Of Contract* by GH Treitel, 3rd edn, p. 312, Anson's *Law of Contract*, 26th edn, p. 223-224 and *The Sale And Purchase Of Real Property In Malaysia* by Visu Sinnadurai (1984) p. 337. According to learned counsel for the appellant, the appellant was asking for a declaration to confirm its decision to rescind the five agreements. She did not say why this was necessary. Probably the appellant had some doubt on the sufficiency of their action and wished the court to adjudicate on it. In *Teh Khem On v. Yeoh & Wu Development Sdn Bhd* [1996] 2 CLJ 1105, at p. 1113 commenting on prayer (1) in the purchaser's claim, the Ipoh High Court said:

> By prayer (1), the purchasers claim an order that the said agreement dated 29 November 1983 'be rescinded' and that the vendor/builder do repay the purchasers the sum of RM78,500.00 being the purchase price. There is something unusual about this prayer.
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> The words 'be rescinded' could normally refer to the rescission *ab initio* in equity for lack of free consent in regard to fraud, mistake, etc which vitiates free consent and which also involves the remedy of *restitutio in integrum*. When a contract is thus rescinded, it is abrogated as if it has never been made.
>
> The same words by themselves, could sometimes refer to a termination of contract by an innocent party to a contract on account of a breach of the contract committed by the other party where the innocent party treats the contract as at an end with the usual legal consequences.

a In the light of what has just been stated, the prayer (1) sounds like a rescission *ab initio* being asked for with the demand of the refund of the full purchase price. But, the cause of action and the evidence on which it is based are one of ordinary breach of contract, and not an equitable claim of rescission of contract *ab initio*. The claim for refund of the purchase price which is consistent normally with a rescission *ab initio* will thus be disallowed.

b **The claim for rescission of contract for its breach could be considered by the court though it is unusual**; unusual because as victim of a breach of contract usually terminates or rescinds the contract for breach before going to court, instead of asking for an order for such rescission for breach. This could mean that the purchasers had some doubt about the sufficiency of their cause c of action and wanted the court to adjudicate thereon.

In *Johnson v. Agnew* [1980] AC 367 at 392 commenting on the term "rescission" Lord Wilberforce said:

> d At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases e of a contractual right to rescind may fall under this principle but are not relevant to the present discussion). In the case of an accepted repudiatory breach the contract has come into existence but has been put to an end or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring f about "rescission *ab initio*". I need only quote one passage to establish these propositions.

In *Heyman v. Darwins Ltd* [1942] AC 356 Lord Porter said, at p. 399:

> g To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation h as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.

Order 81 RHC does not spell out the type of "rescission" that is covered by it.

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The Supreme Court Practice 1997, vol. 1, part 1, at p. 1437 describes the scope of O. 86 of the English Rules of the Supreme Court 1965 as follows:

> The order is not limited to claims for specific performance but covers also claims for rescission of contracts of sale, lease, etc. *It is plain that "rescission" in para. (1)(b) is used in the wide sense, including the acceptance by the plaintiff of a repudiation by the defendant of the contract by breach, and is not confined to the narrower sense to which the House of Lords in Johnson v. Agnew [1980] AC 367 said "rescission" should be restricted.* Therefore any claim by a vendor or purchaser, whether seeking to enforce the contract specifically or to have it set aside, **or for a declaration that it is at an end, in each case with or without a claim for damages, is within the order**. Therefore all claims in the Ch.D. whether for enforcing or setting aside contracts for sale with all consequential relief fall within this Order and not O. 14. O. 14 does not apply to an action to which O. 86 applies: O. 14 r. 1(5).

Order 86 r. 1 and O. 14 r. 1 of the English RSC are similar to O. 81 r. 1 and O. 14 r. 1 of our RHC respectively. In my view therefore, the observation on O. 86 r. 1 of the English RSC adverted to above is relevant and very useful in resolving the issue before the court.

The declaration applied for by the appellant in encl. 7 and the writ is a declaration that the five agreements are void. In other words in effect the appellant was asking for a declaration that the five agreements are at an end. Consequent to that, the appellant prayed that the sum of RM2,085,390 as general damages, exemplary damages, interest and cost be awarded. If the court allows the appellant's application and makes an order in terms of prayer (a) in encl. 7, the court would be making an order declaring that the five agreements are void or rescinded (therefore at an end). In the circumstances I hold that the claim by the appellant in this case is in the category of a claim for rescission coupled with a claim for damages, bringing it under O. 81 r. 1 of RHC. Order 14 r. 1 RHC therefore shall not apply and the application for summary judgment applied for (under O. 14 r. 1) in encl. 7 cannot stand. The Deputy Registrar's decision to reject the application in encl. 7 was correct.

In the result the appeal by the appellant in encl. 29 is dismissed with costs.